Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 88-2134

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES J. BAZARIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's delivery of a supplemental jury instruction outside of petitioner's presence was harmless error.

2. Whether the court should have required the jury to return a special verdict.

3. Whether the evidence was sufficient to support petitioner's conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 871 F.2d 957.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on April 27, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was con-

victed of bank fraud, in violation of 18 U.S.C. 1344 (Supp. V 1987); misapplication of bank funds, in violation of 18 U.S.C. 656; and conspiracy to defraud a federally insured bank, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment on each count, and he was fined $100,000 on the conspiracy count. The court of appeals affirmed.

1. The evidence at trial showed that Michael Rapp devised a scheme to defraud Florida Center Bank (FCB) in Orlando of millions of dollars through a loan and a stock purchase. Rapp's involvement in the transactions could not be revealed to federal regulators because he had a felony conviction for securities fraud. He therefore hired two men, Clyde Pitchford and Hugh Wiley, to purchase the bank's stock on his behalf. To finance the purchase, Rapp applied for a $30 million interest-free loan from FCB. The nominal borrower was Pace-Com, a fledgling corporation with virtually no assets, a poor credit history, and a straw president, co-defendant Michael Smith.[1] John Bodziak, yet another of Rapp's co-conspirators, was the Chairman of the Board at FCB. He obtained the board's approval for the Pace-Com loan and for the stock purchase. The loan was to be secured by 10-year certificates of deposit purchased from the bank. FCB agreed to prepay the interest on the certificates. Gov't C.A. Br. 3-4, 22.

Petitioner agreed to assist Rapp in purchasing the certificates of deposit needed to set Rapp's scheme in motion. Two days before the Pace-Com loan closing date, Rapp, Smith, and Pitchford met with petitioner in his house in

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[1] In lieu of interest, the bank agreed to accept a portion of Pace-Com's profits, if any. Since Pace-Com was a shell corporation, however, there was no prospect of future profits. Also, the loan could not be called into default for ten years, and Pace-Com was not obligated to pay back any of the principal until that time. In short, the bank was certain to lose money on this high-risk, interest-free loan. Gov't C.A. Br. 22, 24.

Oklahoma. Petitioner introduced Rapp to co-conspirator Mario Renda, a money broker, and Ed Mittlestet, the President of an Oklahoma savings and loan.[2] Rapp explained that he wanted to borrow $20 million for one day, and he promised to pay petitioner $300,000 for arranging the loan. After petitioner and Renda asked many questions about the details of Rapp's plan, Rapp assured petitioner that the money would never leave his hands. According to Rapp's plan, petitioner agreed to provide cashiers checks that would not be cashed by FCB until the proceeds of the Pace-Com loan had been wired from the Florida bank to petitioner's account at Mittlestet's savings and loan in Oklahoma. Gov't C.A. Br. 19.

At petitioner's direction, Mittlestet prepared two $5 million cashiers checks drawn on petitioner's account, which at the time contained only $23,000. Petitioner ordered Mittlestet not to release the checks to Rapp and his associates in Florida until FCB wired $10.3 million into petitioner's account. Mittlestet and Renda then flew to Florida with the checks. At the loan closing, Renda gave the checks to Bodziak. Bodziak used one of the checks to purchase a $5 million certificate of deposit on Pace-Com's behalf. FCB prepaid the interest on the certificate and deposited it in Pace-Com's account. Pursuant to Rapp's agreement with petitioner, however, Bodziak did not cash the $5 million check that he used to purchase the certificate. Gov't C.A. Br. 20-26.

Using the $5 million certificate of deposit as collateral, Pace-Com drew $5 million on its loan. The loan proceeds and the prepaid interest on the certificate totaled

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[2] Rapp, Bodziak, Smith, and Renda were tried together with petitioner and were each convicted of conspiracy and related charges. Wiley was acquitted on all counts. Pitchford pleaded guilty to some of the charges. Mittlestet was not indicted for his role in the scheme.

$6,781,484.81. The bank deposited that sum in Pace-Com's account. Pace-Com then repeated the transaction, withdrawing $5 million from the account to purchase another certificate of deposit, drawing another $5 million on its loan, and depositing both the loan proceeds and the prepaid interest in its account, which already contained the $1.78 million profit from the first transaction. Thus, at the end of the second transaction, Pace-Com had $8,581,618.31 in its account. The transaction was repeated again bringing the total in Pace-Com's account to $10,341,751.81. Although the circular transaction could have been repeated three more times until Pace-Com had drawn the full $30 million, the parties stopped after three draws and moved on to the stock purchase. Gov't C.A. Br. 22-24.

Pitchford and Wiley used the second $5 million cashiers check provided by petitioner to execute the stock purchase. Thereafter, FCB wired $10.3 million from Pace-Com's account to petitioner's account in Oklahoma. After the money was received in Oklahoma, Bodziak cashed the two $5 million cashiers checks, leaving the $300,000 fee in petitioner's account. Petitioner paid Renda $100,000. In short, petitioner netted $200,000 for letting Rapp use two pieces of paper – unfunded $5 million cashiers checks – to execute his scheme to defraud Florida Center Bank of millions of dollars. Gov't C.A. Br. 25-26.

Shortly after Rapp's scheme was completed, FCB failed, and the Federal Deposit Insurance Corporation assumed its liabilities. Gov't C.A. Br. 27.

2. After five days of deliberations, the jury sent the court a note stating that it had reached a verdict as to two defendants, but that it could not reach a unanimous verdict as to petitioner and Renda.[3] The jury then asked,

[3] The jury had already rendered guilty verdicts against Smith and Rapp. The jury indicated in its note that it had now reached a verdict

"What should we do from here?" Without consulting either the government or defense counsel, the court assembled the jury and delivered a modified *Allen* charge.[4]

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as to Bodziak (guilty as to all but one count) and Wiley (not guilty), but that it could not agree as to petitioner and Renda.

[4] See *Allen* v. *United States*, 164 U.S. 492 (1896). The court instructed the jury (Gov't C.A. Br. 69 n.25):

> I am going to read one additional instruction at this time. Members of the jury, I am going to ask you to continue your deliberations in an effort to reach an agreement upon a verdict and dispose of the issues that have not already been resolved in this case. I have a few additional comments that I would like for you to consider. This is an important case. The trial has been extensive in time, effort, money and emotions, and strain both to the defense and the prosecution. If you should fail to agree upon a verdict, the case will be left open and may have to be tried all over again. Obviously another trial would only serve to increase the costs to both sides. There is no reason to believe that this case can be tried again by either side any better or more exhaustively than has been tried before you. Any future jury must be selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case could ever be submitted to twelve men and women who are more conscientious, more capable, or more competent to decide it, or more clearer evidence could be produced. If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a lesser number of you are in favor of acquittal, the rest of you should ask yourself again and most thoughtfully whether you should accept the weight and sufficiency of the evidence which fails to convince your fellow jurors beyond a reasonable doubt. Remember at all times that no juror is expected to give up an honest belief he may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so. You must also remember that if the evidence in the case fails to establish guilt

None of the parties were present. Thereafter, petitioner was given a copy of the supplemental instruction and he requested a mistrial. While the jury was still deliberating, the court ruled that it would have given the instruction even if it had first consulted counsel, and that it would not have granted, nor would it now grant, a mistrial. The court refused petitioner's request to remind the jury yet a third time of its duty to agree unanimously on the object of the conspiracy. Gov't C.A. Br. 68-72.

3. The court of appeals affirmed. The court rejected petitioner's claim that the evidence was insufficient to show that he had knowlege of the fraudulent objective of the conspiracy—"to defraud FCB and misapply its funds by covertly pledging as security for the PaceCom loan certificates of deposit purchased with proceeds of the loan, thereby leaving FCB in an essentially unsecured position with respect to the loan." Pet. App. 13a. Pitchford had testified that Rapp's scheme of borrowing money against certificates of deposit was fully explained to petitioner, and that Rapp also assured petitioner that his cashiers checks, which would be used to purchase the certificates of deposit, would not be cashed until the loan proceeds were wired into petitioner's account. Petitioner therefore knew that his cashiers checks would be used to defraud FCB into providing essentially an unsecured, multi-million dollar loan to Pace-Com. Pet. App. 14a. The court further held

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beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty. You may be as leisurely in your deliberations as the occasion may require and should take all the time which you feel is necessary. I will ask you now to retire again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions that I have previously given you. If you again go back and are not able to agree, let me know and I will declare a mistrial.

that petitioner did not have to know about the stock purchase in order to be convicted on the conspiracy count. *Ibid.*

The court of appeals agreed with petitioner that the district court erred when it delivered an *Allen* charge without first consulting counsel and without permitting petitioner or his counsel an opportunity to be present when the supplemental instruction was given. The court also assumed without deciding that the error was of constitutional dimension. Pet. App. 16a-17a & n.15. Nevertheless, the court found that the error was harmless. *Id.* at 17a-20a. The court observed that petitioner did not dispute that the instruction was responsive to the jury's note and that it correctly stated the law. The court rejected petitioner's argument that he was prejudiced because he was not afforded an opportunity to persuade the district court to declare a mistrial instead of sending the jury back for further deliberations. The court of appeals noted that the district court had considered and rejected petitioner's plea for a mistrial after delivering the *Allen* charge but before the jury reached a verdict. The court of appeals also held that petitioner was not prejudiced by the district court's failure to remind the jury once again of its duty to agree unanimously on which object of the conspiracy petitioner conspired to commit. Pet. App. 19a. And finally, the court refused to entertain petitioner's untimely argument that the *Allen* charge may have misled the jury into believing that if it failed to reach a verdict as to any one defendant, a mistrial would be declared as to all defendants. Pet. App. 20a.

ARGUMENT

1. We do not dispute that the district court violated Rule 43 of the Federal Rules of Criminal Procedure when

it delivered the modified *Allen* charge outside of petitioner's presence.[5] That error, however, was clearly harmless, as the court of appeals held. Petitioner does not point to any prejudice that he suffered as a result of the modified *Allen* charge, nor can he. He does not contest the form or the content of the *Allen* charge given by the district court, which was balanced and not unduly coercive. See *Lowenfield* v. *Phelps*, 108 S. Ct. 546, 649-552 (1988) (approving the giving of a modified *Allen* charge). And he had no right to a mistrial when the jury announced that it could not reach a verdict. This was the first time during five days of deliberation that the jury stated that it was unable to agree as to any defendant.[6] Certainly, the decision to send the jury back for further deliberations was not an abuse of discretion. See *Lowenfield* v. *Phelps*, *supra*. Unable to show prejudice, petitioner argues instead (1) that the harmless error rule does not apply to the error at issue here, and (2) that in any case prejudice is not a prerequisite to reversal. Neither of these arguments has merit.

It is well settled that harmless error analysis applies where a trial judge communicates with the jury ex parte,

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[5] Rule 43 provides that the "defendant shall be present * * * at every stage of the trial including the impaneling of the jury and the return of the verdict * * *."

[6] Contrary to petitioner's unsubstantiated assertion (see Pet. 17-19), the jury had not previously announced that it was unable to reach a verdict as to any defendant. See 8 R.A. Doc. Nos. 397, 398, 399, 401, 407. Rather, on one occasion the jury asked, "if we can't come to unanimous agreement on the various offenses listed under [the conspiracy count], shall we give a verdict of not guilty as suggested [in the jury instructions]." 8 R.A. Doc. No. 401. This hypothetical question, which the court answered in part by repeating the unanimity instruction, does not give rise to the inference that the jury was then deadlocked.

in violation of Fed. R. Crim. P. 43. See, *e.g.*, *Rushen* v. *Spain*, 464 U.S. 114, 119-120 (1983); *Rogers* v. *United States*, 422 U.S. 35, 38-40 (1975); *United States* v. *Watchmaker*, 761 F.2d 1459, 1465-1466 (11th Cir. 1985), cert. denied, 474 U.S. 1100 (1986) (failure to contact defense counsel before instructing the jury to resume deliberations and to try to reach a verdict was harmless error); *United States* v. *Breedlove*, 576 F.2d 57, 59-60 (5th Cir. 1978) (failure to consult counsel is harmless "when the Judge's answer to the jury's inquiry was distinctly responsive to the question, it clearly stated the law, and no prejudice is shown").

Petitioner argues (Pet. 14) that in *Rushen* v. *Spain*, *supra*, this Court warned that giving additional instructions to a jury in the absence of the defendant and his counsel can never be harmless error. Petitioner relies not on any holding of the Court, but on the Court's parenthetical description of a prior case, *Rogers* v. *United States*, *supra*. The Court in *Rushen* characterized the holding of *Rogers* as follows: "although violations of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from judge to jury, without notification to defendant or his counsel, is not." *Rushen* v. *Spain*, 464 U.S. at 119 n.4. The language from *Rushen* does not support petitioner's point. It simply notes that the conduct in *Rogers* was held not to be harmless error; it does not suggest that *Rogers* should be read to hold that giving an ex parte instruction to a jury can never be harmless error, no matter how clearly correct or how innocuous the instruction may have been. Nor does *Rogers* itself stand for any such broad principle of per se reversal. In *Rogers*, the Court acknowledged that ex parte communications may be harmless, but it held that in the circumstances of that case, where the supplemental instruction was misleading, reversible error had occurred. 422

U.S. at 40. Nothing in *Rogers* precludes application of the harmless error rule where, as here, a correct supplemental instruction is given.

This Court has repeatedly held that convictions are not set aside for error, whether constitutional or otherwise,[7] in the absence of prejudice. *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983); *Rose* v. *Clark*, 478 U.S. 570, 579-582 (1986). Nor does petitioner's claim gain added force from his effort to characterize the error in this case as a violation of the Sixth Amendment right to counsel. Nonprejudicial restrictions on the right to counsel are usually harmless. See, *e.g.*, *Satterwhite* v. *Texas*, 108 S.Ct. 1792, 1797-1798 (1988); *Strickland* v. *Washington*, 466 U.S. 668, 691-696 (1984); *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972); *Snyder* v. *Massachusetts*, 291 U.S. 97, 114-118 (1934). Only a complete deprivation of counsel or a Sixth Amendment violation that pervades the entire proceeding is reversible error per se. See, *e.g.*, *Holloway* v. *Arkansas*, 435 U.S. 475 (1978); *Gideon* v. *Wainwright*, 372 U.S. 335

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[7] This case does not present the question whether constitutional error occurred because even if the test for constitutional harmless error is used, petitioner cannot prevail. Nevertheless, we submit that the error in this case did not constitute a violation of the right either to counsel or to due process. See *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (the mere occurrence of an ex parte communication between the court and the jury does not give rise to a constitutional violation); *Rushen* v. *Spain*, *supra*, 464 U.S. at 117-118 n. 2; *id.* at 125-126 (Stevens, J., concurring); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107-108 (1934) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only"). Petitioner and his counsel were given a copy of the instruction after it was delivered and were given an opportunity to suggest changes and to seek a mistrial before the jury returned its verdict. The constitutional standards were therefore satisfied.

(1963). In this case, there was no pervasive deprivation of counsel. Rather, counsel's absence when the modified *Allen* charge was given was but a "short interlude in a complex trial." *United States* v. *Gagnon*, 470 U.S. 522, 527 (1985). Consequently, the absence of concrete prejudice is fatal to petitioner's claim.[8]

Finally, *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981), does not conflict with the decision below, as petitioner suggests (Pet. 19-20). In *Ronder*, the trial court twice gave unduly coercive *Allen* charges without consulting counsel. Calling the question "close," the court of appeals reversed Ronder's conviction because the instructions were both flawed and unresponsive to the jury's questions. *Id.* at 934. Significantly, the court applied harmless error analysis in reaching that result. Accordingly, *Ronder* is not at odds with this case, where a correct instruction was given that appropriately responded to the jury's announcement that it was deadlocked.

2. Petitioner contends (Pet. 21-27) that the district court should have required the jury to return a special verdict identifying which object of the conspiracy he had conspired to commit. But special verdicts have long been disfavored in criminal trials. *United States* v. *Dennis*, 786 F.2d 1029, 1041 (11th Cir. 1986), cert. denied, 481 U.S. 1037 (1987); *United States* v. *Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987); *United States* v. *Frezzo Brothers, Inc.*, 602 F.2d 1123, 1129 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir. 1969). Indeed, petitioner cites no case reversing a

[8] Nor can prejudice be assumed, as petitioner suggests, simply because the trial judge may have committed similar errors in unrelated cases. *United States* v. *Payner*, 447 U.S. 727 (1980) (remedies cannot be imposed to vindicate violations suffered by others).

conviction for the failure to use a special verdict form.[9] In the absence of a conflict, further review of this claim is not warranted. In any event, the district court adequately protected petitioner's right to a unanimous verdict by twice instructing the jury that it "must unanimously agree upon which of the various offenses the defendant conspired to commit." Gov't C.A. Br. 73. A special verdict would not have protected petitioner further.[10]

3. Petitioner's fact-bound sufficiency claim (Pet. 27-30) was properly rejected by both courts below. The government's proof unequivocally established that petitioner agreed to provide Rapp with two unfunded $5 million cashiers checks so that Rapp could implement his scheme to defraud FCB of millions of dollars. Prior to joining the conspiracy, petitioner and Renda questioned Rapp extensively about the details of the scheme. Gov't C.A. Br. 46-47. Furthermore, petitioner admonished Mittlestet not to hand over the unfunded checks until FCB wired $10.3 million into his Oklahoma account. *Id.* at 47. Accordingly, petitioner knew that to earn his $300,000 fee,

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[9] Special verdicts were not at issue in *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987), on which petitioner relies. Nor does that case support petitioner's claim that the unanimity instruction given in this case was defective. In *Beros*, the court held that the instructions were unclear because they stated that the jury must be unanimous with regard to the "method, mode, or manner" employed by the defendants to execute their fraudulent scheme, instead of informing the jury that it must be unanimous with regard to a particular act. The wording that troubled the Third Circuit was not used in the instant case. *Beros* therefore does not help petitioner.

[10] Petitioner's additional claim (Pet. 26) that the modified *Allen* charge deprived him of the possibility of a hung jury if unanimity were not achieved is refuted by the record. The district court concluded its supplemental charge by reminding the jury that it was not required to reach a verdict: "If you again go back and are not able to agree, let me know and I will declare a mistrial." See p. 6, note 5, *supra*.

he did not have to lend any money, but only had to appear to be lending money. In these circumstances, petitioner plainly understood that the Pace-Com loan was fraudulent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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